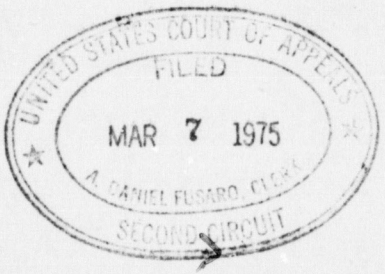
United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

WHM
WHJ
RT

74-2520



To Be Argued By
STEPEHN M. LATIMER, ESQ.

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* *

CAROL CROOKS, *

Plaintiff-Appellee, *

-against- *

JANICE WARNE, individually and as Warden of the Bedford Hills Correctional Facility; CAPTAIN WOOLEY, individually and in her capacity as Captain at the Bedford Hills Correctional Facility; LIEUTENANT CRATTLE, individually and in her capacity as Lieutenant at the Bedford Hills Correctional Facility; *

Defendants-Appellants. *

* *

APPELLEE'S BRIEF

DONALD GRAJALES, ESQ.
Project Director
BRONX LEGAL SERVICES, CORP. C
Attorneys for Plaintiff-Appellee
579 Courtlandt Avenue
Bronx, New York 10451
Tel: (212) 993-6250

STEPEHN M. LATIMER
Of Counsel

2

TABLE OF CONTENTS

Table of Contents
Page 2

* * * *

TABLE OF AUTHORITIES

Cases: Page

Cases: Page

Cases: Page

Cases: Page

* * * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* *

CAROL CROOKS, *

Plaintiff-Appellee, *

-against- *

JANICE WARNE, individually and as Warden of the Bedford Hills Correctional Facility; CAPTAIN WOOLEY, individually and in her capacity as Captain at the Bedford Hills Correctional Facility; LIEUTENANT CRATTLE, individually and in her capacity as Lieutenant at the Bedford Hills Correctional Facility; *

Defendants-Appellants. *

* *

APPELLEE'S BRIEF

QUESTIONS PRESENTED

1. Does due process of law require that, before she may be placed in solitary confinement, a prisoner be granted a hearing consisting of at least written advance notice, an impartial tribunal, the right to present exculpatory evidence, and a written statement of reasons for the disciplinary action?
2. Was the standard used to punish appellee so vague as to violate her right to due process of law?

3. Does this Court have power to adjudicate the issues in-spite of the transfer of appellee to another prison by appellants superiors?

STATEMENT OF THE CASE

A. Proceedings in the District Court

On or about May 31, 1974, Plaintiff, a prisoner then at Bedford Hills Correctional Facility, commenced an action in the United States District of New York pursuant to 42 U.S.C. §1983 and 28 U.S.C. 1343 alleging violations of her Eighth and Fourteenth Amendment rights. She claimed she was being confined in solitary confinement (variously denominated "Special Housing" or "segregation") by the prisons' adjustment committee without the minimal procedural safeguards required by due process of law. (3a) She simultaneously moved by order to show cause for a temporary restraining order and preliminary injunction directing her release from solitary confinement pending a final determination of the action. The temporary restraining order was denied and the motion for a preliminary injunction was made returnable June 3, 1974, at 2:00 P.M. before Judge Brieant.* At that time the motion was adjourned for a brief time, at the suggestion of the Court, to give the parties an opportunity to acheive a compromise whereby appellee would be released

* The Docket does not reflect the filing of the order to show cause, nor is the order contained in the Joint appendix. Therefore a copy and the papers upon which it is based is annexed as appendix A.

to the general prison population pending a final determination of the action.

Appellants refused to accede to Judge Brieant's suggestion and the motion for a preliminary injunction was adjourned until July 1, 1974, for an evidentiary hearing. Pursuant to F.R.C.P. 65(a)(2) and oral stipulation of the parties the trial on the merits was advanced and consolidated with the hearing.

The trial was held without a jury on July 1 and 2, 1974. At the conclusion of the trial Judge Brieant found that the requirements for issuance of a preliminary injunction (T350) were satisfied. He preliminarily determined that:

1) appellee is entitled to a hearing before an impartial adjustment committee, (T351) consisting of persons who had not had prior relationships of any kind with proceedings involving appellee beginning in February, 1974, (T352);

2) appellee is entitled to written notice 24 hours in advance of any disciplinary hearing, (T352);

3) any punitive segregation of appellee must be based on objective facts and misconduct, (T352);

4) any non-punitive segregation, i.e. segregation

based on fears that appellees' presence in the general population would be disruptive, (T353) must be calculated to grant her every liberty or privilege that can be conferred consistent with her segregated status, (T355, 359).

The Court then directed appellants to release appellee from segregation by July 4, 1974, unless they comply with its directions (T357).

On September 5, 1974, after appellee had been confined in segregation at Bedford Hills from August 28, 1974 to September 1, 1974, without any hearing at all, then transferred to another prison (Fishkill Correctional Facility) without a due process hearing, and held in solitary confinement at Fishkill without a disciplinary hearing, she moved by order to show cause to punish appellant Warne for contempt of the District Courts preliminary injunction (395-398). The motion was denied on the ground that the injunciton did not give appellant Warne adequate notice that ther conduct would be punishable as a criminal contempt, and that because appellee was no longer in Bedford Hills, there was no basis for a civil or coercive contempt proceeding (405).

On October 1, 1974, the District Court issued its findings of fact and conclusions of law. The Court held that

appellants must conform their disciplinary procedures, including the Adjustment Committee, to the standards enunciated in Wolff v. McDonnell, 418 U.S. 539 (1974), specifically that appellee must receive:

> (1) advance written notice of charges to be given no less than 24 hours before an inmate's appearance before the Adjustment Committee; (2) a written statement by the fact-finders as to the evidence relied on and reasons for the disciplinary action; (3) the right to call witnesses and permit documentary evidence in defense, so long as it will not jeopardize institutional safety or correctional goals; (4) the right to inmate assistance or counsel substitute in the event that the inmate is illiterate, or the issues are unusually complex. (376-77)

The District Court also held that the prison administration failed to accord appellee the rights mandated by this Court in Sostre v. McGinnis, 442 F. 2d 178 (2nd Cir. 1971) cert. den. 404 U.S. 1049 (1971). Specifically the Court held that she was not given advance notice of adjustment committee proceedings nor was she given a hearing before an impartial tribunal. (379)

The District Court entered a Final Judgment on October 11, 1974. The Court refused to direct appellants to expunge appellees' records of all adjustment committee proceedings between May 23, 1974, and June 20, 1974, held in violation of the mandates of Sostre v. McGinnis, supra. (393),

but it directed, among other things, that:

> 3. Defendants shall give Plaintiff written notice of charges against her 24 hours in advance of any Adjustment Committee meeting or Superintendents Proceeding to which she is a party.
>
> 4. No member of any Adjustment Committees' meeting to which Plaintiff is a party shall discuss the pending matter with other administrative or superior officers in advance of the hearing.
>
> 5. Plaintiff shall have the right to call witnesses and introduce documentary evidence at any Adjustment Committee meeting or Superintendents Proceeding to which she is a party, provided doing so does not jeopardize institutional safety or correctional goals.
>
> 6. At the conclusion of any Adjustment Committee meeting or Superintendents Proceeding to which Plaintiff is a party, she shall be given a written statement of the evidence relied on and the reasons for any action taken.
>
> 7. Any disciplinary action against Plaintiff by the Adjustment Committee shall be taken only after a finding of misconduct based on objective facts if such action involves punitive segregation. (393)

The Court below also prohibited appellants from confining appellee in punitive segregation for more than 24 hours before written notice of charges are served on her, (394) and continued its direction that if she is segregated for other than punitive reasons she must "be granted every privilege accorded to the general prison population, concommitant with

her segregated status." (394).

B. Nature and Function of the Adjustment Committee

Bedford Hills Correctional Facility is the principal prison for women convicted of felonies in New York State. At the time of trial it was the only such prison (365). Consequently it houses a diverse population in terms of seriousness of crime, length of sentence and prior felonious activity (365). It is manifest that when dealing with so diverse a population there be some flexibility in disciplinary measures employed. At Bedford Hills disciplinary infractions are dealt with by a Superintendents Proceeding, 7 N.Y. C.R.R., Part 253,* or by the adjustment committee 7 N.Y.C.R.R. Part 252.

The Superintendents Proceeding which is not at issue in the case at bar is a highly formalized proceeding designed to punish more serious breaches of discipline 7 N.Y. C.R.R. 253.1(a). An inmate is given advance written notice of the charges 7 N.Y.C.R.R. 253.1(a) is furnished with an employee to assist her 7 N.Y.C.R.R. 253.3(a) and is eventually furnished with a copy of the disposition. By contrast,

* All citations to 7 N.Y.C.R.R. refer to those regulations as they existed at the time of trial. The amended regulations (appellants' br. appendix) made certain changes but the practices complained of below and discussed herein remain substantially the same.

the adjustment committee is devoid of all procedural safeguards. Appellant Warne, Superintendent of Bedford Hills, testified that a prisoner is never given advance notice of an adjustment committee proceeding, nor is she given a written statement of the adjustment committees' disposition. (T241-2). The District Court commented on the lack of alternatives available under either procedure:

> The Superintendent admitted under cross-examination* that no matter how admission to Special Housing was administratively denominated or how diverse were procedures for commitment thereto, there is no difference in the degree of punitiveness of the conditions of a person so confined. This is so whether commitment was by Adjustment Committee proceedings or Superintendent's Proceedings. Inmates placed in Special Housing are all locked in 23 hours a day, whether committed for punitive, protective or administrative confinement. The rigors are the same. (366-67)

Appellants concede the validity of this finding (appellants br. P. 14).

It then becomes apparent that while the stated goal of the adjustment committee is to "secure the inmates understanding of and adherence to the department's rules and policies governing inmate behavior" 7 N.Y.C.R.R. 252.5(a), the effect of the imposition of restrictions including confinement in solitary confinement 7 N.Y.C.R.R. 252.5(e)(3),

---

* T233

is to punish the prisoner. The subterfuge was blatantly exposed by California Director of Corrections Procunier in negotiations over implementation of the District Courts decision in Clutchette v. Procunier, 328 F.Supp. 767, (N.D.Cal., 1971) when:

> "[He] declared in the presence of State Senator Dymally that rather than submit to due process requirements they would simply change the nomenclature and put men into solitary confinement labeled "administrative segregation" rather than "punitive segregation."

Mitford, Kind and Usual Punishment, Alfred A. Knopf, Inc. (1973) P. 263.

The findings of the Court below, and the record, are in accord. The District Court found that:

> As a practical matter, the Adjustment Committee does not function except in cases of objective acts of misconduct... Segregation invoked as a result of objective misconduct and intended to deter the inmate, and by example, to deter other non-compliant prisoners, must be considered as "punitive" and the Court so regards it. Inmates of Bedford Hills are not customarily haled before the Adjustment Committee and placed in segregation solely for "correctional treatment goals" (Wolff, supra, at p. 5200) in the absence of objective misconduct, and therefore the resultant segregation could not be regarded as other than punitive. (370-71)

In this regard Mrs. Warne testified that the adjustment committee has a disciplinary as well as a counselling

function (T224-26). Deputy Superintendent Clement testified on direct examination that a prime function of the adjustment committee is to adjudicate infractions or rule violations; (T260) and that the adjustment committee imposes punitive sanctions (T261).

Moreover, once an inmate is brought before the adjustment committee because of alleged misbehavior, not only are the facts and circumstances of the particular incident considered in deciding whether to mete out punishment, but the adjustment committee bases its evaluation on "the inmates attitude and overall adjustment..." 7 N.Y.C.R.R., 252.5(b). If her attitude is unsatisfactory that attitude is also punished and Deputy Superintendent Clement so testified. (T260).

The applicable regulations permit the adjustment committee to confine an inmate in segregation for one week, 7 N.Y.C.R.R. 252.5(e)(3), and to extend the confinement for successive one week periods if her attitude has not changed, provided only that she is interviewed by the committee once each week 7 N.Y.C.R.R. 252.5(f). Warne, Clement and Wooley all testified that the adjustment committee may keep a prisoner confined in segregation indefinitely, subject only to review every thirty days by the Superintendent (T232, 238-39,

262-63, 274).* Defendant Wooley's testimony on direct examination, inferring that often the adjustment committee predetermines that an inmate will be confined in segregation for more than one week, is particularly illuminating:

> Carol asked the questi[illegible] she going to be confined for the len[illegible]e duration of her sentence, to which [illegible]d, "No, that is not the case, Carol. You w[illegible] be seen weekly while you are here."
>
> She asked about privileges. She asked was Mrs. Warren [sic] aware of this situation and had we discussed it with Mrs. Warren. I don't think -- I don't recall mentioning Mrs. Warren's name. I believe I referred to Mrs. Warren and Miss Clement and my superiors as administration. I said, "The situation had been discussed with administration, and taking into consideration the overall pattern of behavior," Carol's background, we felt it was necessary to confine her to the segregation unit for the present, but she would be seen "within the week".
>
> I quote that. An expression we always use when we confine a girl for longer than one week, I say she would be seen "within the week". (T274)

C. Adjustment Committee Proceedings Against Appellee

The Adjustment Committee proceedings against appellee during the period May 23, 1974 - June 20, 1974, demonstrate the worst excesses that may result when prison authorities are permitted to arbitrarily impose solitary con-

---

* In Powell v. Preiser, S.D.N.Y. Docket No. 74 Civ. 4628(CES), involving similar issues, Deputy Commissioner Burke, testifying at hearings on Plaintiffs' motion for a preliminary injunction confirmed this possibility and approved of it as Department Policy (transcript of hearings December 1974, (p. 466-7).

finement for excessive periods of time in contravention of minimum standards required by due process of law.

On February 3, 1974 appellee was involved in an incident involving an alleged assault on four correction officers (T217). A Superintendents Proceeding was held on March 8, 1974, at which appellee was awarded sixty days in segregation, six months loss of good time and referred to the adjustment committee (T103). On March 15, 1974, appellee appeared before the adjustment committee and was charged with disassembling her bed and breaking a window on February 3, 1974, more than a month earlier (T163), a charge that Mrs. Warne testified was to be covered by the March 8th, Superintendents Proceeding (T221). Appellee received no advance notice of the adjustment committee proceeding and was unaware of the charges until she walked into the adjustment committee room (T105).

On March 21, 1974, appellee was transferred to the Westchester County Jail at Grasslands Vachalla where she was kept isolated from the general population until her return to Bedford Hills on May 9, 1974 (T106-9). As a result, her release date from segregation was extended to May 23, 1974, (15a,16a). She remained in segregation until June 27, 1974, when she was brought to the New York City Correctional Institution for Women to testify in this action. The total

so confined including the sojourn in Westchester was five months.*

1. The May 23, 1974, Adjustment Committee

The District Court found, and appellants do not dispute, that on the morning of May 23, 1974, appellee was let out of her cell and permitted to remain in the day room of Special Housing until she was seen by an adjustment committee consisting of appellants Wooley, Cradle and Mr. Smith, a civilian employee (372). The District Court further found, and appellants concede, that prior to the adjustment committee meeting appellants Wooley and Cradle met with appellant Warne to discuss appellee's situation (373)(appellants' br. p.13). Consequently, the Court below said,

> "The conclusion is inescapable that such a discussion amounted to a tentative determination and disposition of plaintiffs future confinement prior to according her any hearing." (373)

Indeed, appellant Wooley testified that prior to the May 23, 1974, adjustment committee meeting she told appellant Warne that she did not believe that appellee should be placed back in the general population (T289,290).

Based on appellee's testimony (T126), corroborated

* In their brief in opposition to plaintiff's motion for a preliminary injunction in Powell v. Preiser, supra, appellants admit that appellee's confinement was unreasonable (a copy is annexed as appendix B).

by appellant Wooley (T274, 281-2), Judge Brieant found that the Adjustment Committee directed appellee to remain in segregation, that she was not to be deprived of all privileges, and that her case would be reviewed weekly (372-3). The following day appellant Wooley unilaterally rescinded the order granting appellee certain privileges and directed the evening officer, Miss Doyle, to ask appellee to lock in her cell (T282). Appellee, somewhat confused by the sudden revocation of privileges asked for written directions (T128, 282). Instead, a show of force was dispatched to the Special Housing unit and appellee, desirous of avoiding an incident went to her cell (T46, 48, 69, 70, 131, 285).

2. Adjustment Committee Proceedings Between May 24, 1974 and July 1, 1974

Appellee remained in segregation and was interviewed by the Adjustment Committee on May 26, June 3,6,13, and 20, 1974. (374) The trial court found, and appellants concede, that she was given no advance notice of any of these meetings, nor was she ever given a written statement of the adjustment committee action and the reasons therefore. (375 Appellants' br. p.14). Appellants further concede that appellee was not permitted to confront or cross examine witnesses, or to call witnesses in her own behalf. (Appellants

br. p.14) The District Court found that these adjustment committees were composed of the same personnel that sat on May 23, 1974. Significantly, appellants Cradle and Wooley were responsible for reviewing reports of the February 3, 1974 incident, thus participating in that investigation (T297, 317), and could not be impartial.

Judge Brieant also found that "Adjustment Committee reports of these meetings are relatively incident free insofar as concerns plaintiff..." (374). The reports list appellee's attitude as "good" (May 26, 1974)(Defendants' Exhibit L), "satisfactory" (June 3, 1974)(389-90)* "good" (June 6, 1974)(Defendants' Exhibit I), "fair" (June 20, 1974) (390). At the June 20, 1974, adjustment committee proceeding Lt. Guenther told appellee that her reports to date had been satisfactory (T333). Yet, the adjustment committee continued appellee's confinement. Appellant Warne, on June 22, 1974, after reviewing the adjustment committee reports decided to continue appellee's confinement in segregation, despite the positive indications contained therein (375). It was

* The June 3, 1974, report states that appellee was "contempuous of us and refused to sit down". (390) Yet appellant Cradle admitted in response to a question by the Court that it is not contemptuous for the prisoner to stand if she is asked to sit (T313).

to prevent such blatant arbitrariness that Judge Brieant held that the weekly reviews of appellee's confinement must be de novo hearings and must conform to the Wolff standards. (381).

POINT I

THE DISTRICT COURTS JUDGMENT IS THE MINIMUM NECESSARY TO ENSURE THAT APPELLEE IS NOT PUNISHED IN VIOLATION OF DUE PROCESS OF LAW

While imprisonment by its very nature may sometimes require a dimunition of individual rights, prisoners remain entitled to the protection of the due process clause of the Fourteenth Amendment. Wolff v. McDonnell, supra, Haines v. Kerner, 404 U.S. 519 (1972); Wilwording v. Swenson, 404 U.S. 249 (1971); Screws v. U.S., 325 U.S. 91 (1945). Many Courts of Appeals including this Court recognize that a prisoner is entitled to a due process hearing before she is placed in solitary confinement, e.g. Sostre v. McGinnis, supra, Cluchette v. Procunier, 497 F.2d 809 (9Cir.,1974); U.S. ex. rel. Miller v. Twomey, 479 F2d 701 (7Cir.,1973); Braxton v. Carlson, 483 F2d 933 (3Cir.,1973); Baxter v. Palmigiano, 487 F2d 1280 (1 Cir., 1973), but disagree on the elements of that hearing. See Wolff v. McDonnell, supra, 94 S.Ct. at 2982 n 20. Consequently, the U.S. Supreme Court

in Wolff v. McDonnell, laid down the basic requirements for prison disciplinary proceedings where grievous loss may result:

> (1) written notice of the claimed violation 24 hours in advance of the hearing in order to give her a chance to marshal the facts in her defense, and to clarify the charges; 94 S.Ct. at 2978
>
> (2) a written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action; 94 S.Ct. at 2978
>
> (3) the opportunity to call witnesses and present documentary evidence in her defense when doing so will not be unduly hazardous to institutional safety or correctional goals. 94 S.Ct. at 2979 The Court recommended that the Adjustment Committee state its reasons for refusing to call a witness; 94 S.Ct. at 2980
>
> (4) where the prisoner is illiterate or the issues are complex she should be permitted to seek the aid of a fellow inmate; 94 S.Ct. at 2982.

Appellants concede that none of these procedures were followed in appellee's case (Appellants' br. p. 14). That should end the matter, but appellants argue that because the goals of the adjustment committee are stated to be evaluation, not punishment, they need not accord appellee, (or anyone else) her due process rights. However, as this Court noted when discussing the adjustment committee at Attica Correctional Facility:

> The variety of possible charges, the erroneously long confinement are all part and parcel of an internal disciplinary system which doubtless contributed to the Attica riot in the first instance (see Attica: The Official Report of the New York State Special Commission on

> Attica (Bantam ed. 1972) 74-79), which have resulted in other litigation, but which in any event are now outmoded and, for the future at least, wholly unconstitutional under Wolff v. McDonnell, supra.

U.S. ex. rel. Larkins v. Oswald, Docket No. 74-1885 (Jan. 24, 1975) sl. op. p. 8.

In Newkirk v. Butler, 499 F2d 1214, 1217 (2nd Cir. 1974) cert. granted U.S. (1974), this Court recognized that the adverse consequences to the prisoner and the chance of error are the principal elements in determining what process is due. Classification of disciplinary procedures by label, the ultimate in the exaltation of form over substance, cannot be a substitute for Fourteenth Amendment rights.

The adjustment committee at Bedford Hills may, under the original or amended regulations, keep a prisoner confined in segregation indefinitely see supra p. 11-12. The construction urged by appellants by relying on a mere label ignores this grievous loss and the resultant adverse parole consequences. However, any procedure that results in such loss, no matter what descriptive nomenclature is used, must conform to due process standards. Goldberg v. Kelly, 397 U.S. 254 (1970); Newkirk v. Butler, supra. To hold otherwise would permit state officials to render the due process clause of the Fourteenth Amendment meaningless merely by the

clever use of semantics.

A. The Procedures Ordered by the District Court are Necessary to Ensure A Fair Hearing

The District Court's direction with respect to written notice 24 hours in advance of any disciplinary proceeding, impartiality of the tribunal, the right to call witnesses in her behalf, and the right to a written statement of action taken are the minimum procedures necessary to comply with Wolff, supra. The Wolff Court said however, that these requirements are "not graven in stone" 94 S.Ct. at 2982, and that circumstances may require additional safeguards.

The District Court ordered that written notice of charges be served on appellee within 24 hours if it is necessary to place her in segregation before a hearing. That is the least drastic alternative to ensure that charges are served promptly and that appellee does not suffer a grievous loss in violation of her due process rights. In Goss v. Lopez, 43 U.S.L.W. 4181 (January 22, 1975) the Supreme Court required due process safeguards to be applied when a student is suspended from school for ten days or less. Speaking of the notice requirement the Court said:

> Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the

> student from school. We agree with the District Court, however, that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an on-going threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable, as the District Court indicated.

Likewise, in Morrisey v. Brewer, 408 U.S. 471 485, 487 (1972) the Court required a prompt notice followed by a preliminary hearing before parole could be revoked. Cf. Goldberg v. Kelly supra, 397 U.S. at 266 where the Court required prompt and adequate notice prior to termination of welfare benefits.

The events of August 28, 1974, and following are a classic example of the need for prompt notice to aviod arbitrary action. When asked to go to segregation on that date appellee requested written notice of charges. That request was refused and she was confined in segregation for at least 7 days in two different prisons without receiving any hearing or notice of charges (397-8). As a result appellee suffered the rigors of solitary confinement for longer than is permissible by an initial adjustment committee determination. To prevent this situation, a District Court in Tillman v. Board of Prison Inspectors 8 Clearinghouse Rev. 512 (not officially reported) No. 73-2771 (E.D.Pa., Sept. 5,

1974) provided that any disciplinary hearing be held within five days of the first day of confinement in isolation. Any other rule would enable the prison administrators to circumvent the letter and spirit of the due process clause by acting as they did in appellee's case.

A basic requirement of due process of law denied to appellee is that she be presented with a written statement of the adjustment committee's findings and the evidence relied on. Wolff v. McDonnell, supra,; Morrisey v. Brewer, supra,; U.S. ex. rel. Johnson v. New York Board of Parole, 500 F2d 925 (2nd Cir., 1974) vac. as moot sub nom Regan v. Johnson, 43 U.S.L.W. 3294 (Nov.11, 1974), Escalera v. New York City Housing Authority, 425 F2d 853 (2nd Cir., 1970) cert. den. 400U.S. 853, (1970); Cluchette v. Procunier, supra.

To ensure against arbitrary action by the fact-finders (the adjustment committee here) any decision must be based on the available evidence, Goldberg v. Kelly, supra, 397 U.S. at 271, and not on appellee's past behavior or reputation. National Sheriffs Association, Handbook on Inmates Legal Rights (1974) p. 25. To protect against arbitrary action by the disciplinary body:

> A written decision containing a clear, articulated rationale stated in terms of the evidence would appear to be essential to assure that the decision is, in fact, based on the available evidence.

"Survey of Prison Disciplinary Practice and Procedures" of the American Bar Association's Commission of Correctional Facilities and Services (Rev. Ed. Dec., 1974) p. 24 ("ABA Study").

Where a prisoner has the right to appeal from an adverse decision, as she does in New York, 7 N.Y.C.R.R. 270.1(a)(1), a written statement is essential if she is to frame an intelligent appeal. Most important:

> Further, as to the disciplinary action itself, the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly.

Wolff, supra, 94 S.Ct. at 2979.

The District Court also directed that at any disciplinary proceeding, appellee be permitted to present witnesses, and documentary evidence in her behalf, provided institutional safety and correctional goals are not jeopardized. (393) Wolff, supra, 94 S.Ct. at 2979. This right, denied to appellee by appellants, is a necessary adjunct to the right to be heard, an indispensable element of due process Morrisey v. Brewer, supra, Goldberg v. Kelly, supra, Escoe v. Zerbst, 295 U.S. 490, 493 (1935). Its importance was underscored by Mr. Justice Marshall in his dissent in

Wolff, 94 S.Ct. at 2988:

> But in my view the exceptions made to the constitutional rule must be kept to an absolute minimum, and each refusal to permit witnesses justified in writing in the disciplinary file, a rule the majority finds "useful" but in inexplicably refuses to prescribe. Ante, at___. And if prison authorities persist in a niggardly interpretation of the inmates' right to call witnesses, it must ultimately be up to the courts to exercise their great responsibility under our constitutional plan and enforce this fundamental constitutional right.

Without the right to present evidence in her behalf, the adjustment committee is weighted heavily against her. It is likely that the testimony of correction officers and prison officials will be given more credence than the mere denials of the prisoner. The only way she can defend herself is to present witnesses who will support her version of the facts. To deny the prisoner this right is to deprive her of a full and fair hearing.

B. The Adjustment Committee Proceedings Against Appellee Violate Pre-Wolff Standards of Due Process

The requirements of due process governing prison disciplinary proceedings in the Second Circuit were enumerated in Sostre v. McGinnis, supra. They require that the prisoner be given adequate notice, 442 F2d at 203, be confronted with the accusation, informed of the evidence against

her, and be given an opportunity to explain her actions. Id at 198. Implicit in the Sostre holding that the proceedings be "fair and rational" is the requirement of impartiality.

As stated by the District Court:

> ...it is implicit that a hearing officer should not have had prior discussions of the outcome of a future quasi-judicial proceeding and should not have been an investigative officer of witness. Morrissey v. Brewer, 408 U.S. 471 (1972); Escalera v. N.Y.C. Housing Authority, 425 F.2d 853 (2d Cir. 1970); Goldberg v. Kelly, 397 U.S. 254 (1970); Sands v. Wainwright, 357 F.Supp. 1062, (M.D. Fla. 1973); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

The prior discussions among the adjustment committee members and with appellant Warne, supra p. 14, the facts that appellants Cradle and Wooley investigated the underlying incident and that appellant Wooley had previously been a charging or investigating officer against plaintiff (T292,293) bely any claim of impartiality.

So was the "notice" given appellee inadequate under Sostre. Even though appellee was told by Appellant Wooley that she would be "seen weekly" while she remained in segregation, she never knew more than a few moments in advance when the committee was going to meet. She never knew whether there were any new charges. Generally, appellee was brought into the adjustment committee room and then and there

notified orally of the matters to be considered (T104, 114, 118). She thus had no "reasonable opportunity to explain the charges" Id at 198, 203. Thus, the District Court correctly declared that the adjustment committee proceedings between May 23, 1974 and June 20, 1974 violated appellee's right not to be deprived of liberty without due process of law. It erred in refusing to order her records expunged of those proceedings.

C. Due Process of Law Requires That The Wolff Procedures Be Followed Each Time Appellee Appears Before The Adjustment Committee

Neither this Court in Sostre, nor the Supreme Court in Wolff considered the implications of the indefinite nature of adjustment committee confinement. In the instant case, appellee served a sixty (60) day sentence awarded by a superintendents proceeding, and was referred to the adjustment committee at the expiration of that term. The adjustment committee kept her confined an additional thirty five days without any procedural safeguards. Cf. Baxtrom v. Herold, 383 U.S. 107 (1966) where the Supreme Court held it impermissible to have a person civilly committed to a mental institution upon the expiration of a penal sentence without the full panoply of due process rights.

We are thus faced with a situation where, through

a labelling device condemned by this Court, Newkirk v. Butler, supra, appellants seek to circumvent the implications of Baxtrom. The prisoners dilemna is apparent. She has no knowledge of what will be considered at the second and subsequent adjustment committees. She may prepare to meet charges discussed at a previous meeting only to discover that the adjustment committee is considering new facts. When she returns to her cell she has no idea what will be considered next time. The only remedy is to treat each adjustment committee as a de novo proceeding and require the appropriate procedural safeguards. Wolff, supra, Morrisey v. Brewer, supra, Sostre v. McGinnis, supra.

No matter the label given to the adjustment committee proceedings, proper due process procedures in the first instance might have avoided due process violations in subsequent adjustment committee actions that are clearly linked to the initial unconstitutional procedure. Wright v. McMann, 321 F.Supp, 127, 145 (N.D.N.Y., 1970) aff'd. 460 F.2d 126 (2d Cir. 1972). The irregularities in the May 23, 1974, adjustment committee are well documented and have been discussed elsewhere, supra p.14-15. All subsequent adjustment committee actions flow from the events of May 23 and 24 and are tainted by them. Id. Appellees' incident free behavior prior to May 23, 1974, and the adjustment committee reports

after that date, indicate that had the adjustment committee functioned in accordance with due process of law the need for her to appear before the Committee in June 1974 might well have been averted.

The District Court held that if appellants desired to segregate appellee from the general population for reasons other than punitive, they must grant her every institutional privilege consistent with her segregated status. (385) However, even under those circumstances, she must be accorded minimal procedural safeguards. Urbano v. McCorkle, 334 F. Supp. 161 (D.C.N.J. 1971) aff'd. 481 F.2d 1400 (3rd Cir, 1973); Guarjardo v. McAdams, 349 F.Supp. 211, 220 (S.D. Tex., 1972) rev'd. on other grounds 491 F.2d 417, (5 Cir., 1973); Sands v. Wainwright, supra, U.S. ex. rel. Walker v. Mancusi, 338 F. Supp. 311 (N.D.N.Y. 1971) aff'd. 467 F.2d 51, (2 Cir., 1972). In Walker, the Court held that a prisoner must be given the right to learn of evidence against her before being administratively segregated, and the opportunity to respond to that evidence 338 F.Supp. at 318. That means that the opportunity must be at a meaningful time, in a meaningful manner, and before an impartial tribunal. Sands, supra, 357 F.Supp. at 1092.

Assuming arguendo that the May 23, 1974, and subsequent adjustment committees were non-punitive* those

* The fact that it was held pursuant to a sentence of the March 8, 1974, Superintendents Proceeding and that the conditions of her confinement remained unchanged after May 23, 1974, undermines that premise.

proceedings do not conform to the minimal requirements enumerated in Walker, Urbano and Sands, all supra. The tribunal, consisting of persons previously involved in investigation and prosecution of incidents directly related to the proceedings before it could not possibly be impartial. The lack of advance notice, oral or wirtten, of matters to be considered the adjustment committees made it impossible for appellee to learn of the evidence against her, and to respond to that evidence. Thus, any adjustment committee determinations were not based on a full understanding of the facts and were arbitrary and capricious.

POINT II

THE STANDARD USED TO PUNISH APPELLEE AFTER MAY 23, 1974, ARE SO VAGUE AS TO VIOLATE HER RIGHT TO DUE PROCESS OF LAW.

Due process of law requires that criminal liability not attach "where one could not reasonably understand that his contemplated conduct is proscribed" United States v. Harriss, 347 U.S. 612, 617 (1954); U.S. v. National Dairy Corp., 372 U.S. 29, 32-33 (1963). See also Smith v. Goguen, U.S. , 94 S.Ct. 1242 (1974); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) Palmer v. Euclid, 402 U.S. 544 (1971) Giacco v. Pennsylvania, 382 U.S. 399 (1966),

Lanzetta v. New Jersey 306 U.S. 451 (1939). The behavioral standard must be examined in light of the conduct with which a person is charged. Robinson v. U.S., 324 U.S. 282 (1945); U.S. v. National Dairy Corp., supra. In Parker v. Levy U.S. 94 S.Ct. 2547 (1974) the U.S. Supreme Court approved this standard for the military, a highly structured society not unlike prisons in the need to maintain order and discipline. Indeed many Courts apply the standard in the prison setting. Soglin v. Kaufman, 418 F.2d 163 (7 Cir. 1969), Landman v. Royster, supra, 333 F.Supp. at 655, Rhem v. McGrath, 326 F.Supp. 681, 691 (S.D.N.Y. 1971), Morris v. Travisono, 310 F.Supp. 857 (D.R.I. 1970), Talley v. Stephens, 347 F.Supp. 683, 689 (E.D. Ark. 1965).

That appellee was subjected to the type of selective law enforcement prohibited in Smith v. Goguen, supra, 94 S.Ct. at 1248-9, (involving a statute prohibiting "treat[ing] contemptuously" the U.S. Flag) is undeniable from the fact that an act, refusing to sit down, was treated as contemptuous when done by appellee, but not when done by others (T312-13). "Attitude" as a criteria for the imposition of disciplinary sanctions is perhaps the standard least susceptible of exact definition and most susceptible to arbitrary determinations. As such it was condemned by the National

Sheriffs Association:

> Third, the rules should promote or protect an improtant interest of the jail. This would rule out punishing mental attitudes or unspoken words. Any rules which venture beyond observable conduct are fraught with danger of abuse, since enforcement will depend on each person's individual interpretation. Rules which are trivial in their intent engender hostility and lack of respect for the jail staff.

Handbook on Inmates Legal Rights, supra, at 23. Cf. Worley v. Bounds, 355 F. Supp. 115, 121-2 (N.D.N.Car., 1973).

Appellants admit in paragraphs ELEVENTH and FIFTEENTH of their answer that appellee was being kept in segregation because of her attitude (19a). This admission was supported by Lt. Guenthers' testimony (T330). The lack of ascertainable standard in appellees case is blatant. She was told by Lt. Guenther that her attitude was good, or satisfactory (T333), yet she remained in segregation. When she asked what more she must do to secure her release, that question was treated as evidence of a poor attitude. The standard for release from segregation as applied to appellee was therefore "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application". Connally v. General Construction Co., 269 U.S. 385, 391 (1926), and the District Courts finding to the contrary is clearly erroneous (375).

POINT III

THE COURT HAS JURISDICTION TO HEAR APPELLEE'S CLAIM, HER TRANSFER TO ANOTHER PRISON NOT WITHSTANDING

Generally, action by a defendant will not render a case moot as long as the original subject matter is "capable of repetition yet evading review" Roe v. Wade, 410 U.S. 113, 125 (1973), Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1911), U.S. v. W.T. Grant Co., 345 U.S. 629 (1953). In New York State a prisoner is subject to transfer to any prison within the Department of Correctional Services, at the discretion of the Department. If the Court were to permit such transfer to moot a case brought to enjoin constitutional violations in a particular prison, then any such litigation:

> ...seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid.

Roe v. Wade, supra, 410 U.S. at 125. See, Newkirk v. Butler, supra, 499 F.2d at 1219, where this court rejected a claim of mootness because of the great likelihood of future transfers in the New York State prison system. See also, Super Tire and Engineering Co. v. McCorkle, 416 U.S. 115 (1974).*

* Appellants reliance on DeFunis v. Odegaard, 416 U.S. 312 (1974) is misplaced. That case became moot by the mere passage of time, because DeFunis had voluntarily almost completed law school.

So in the instant case there is more than a mere possibility that appellee will be returned to Bedford Hills. The punitive transfer of appellee is currently in litigation before the District Court for the Southern District of New York.* If she is successful there is no other prison to send appellee but Bedford Hills.** In that event, there is every "reasonable expectation that the wrong will be repeated." U.S. v. W.T. Grant Co., supra, 345 U.S. at 633, U.S. v. Concentrated Phosphate Export Ass'n., 393 U.S. 199, 203 (1968).

Moreover, when the issue is of great public importance, and will probably be the subject of repetitious litigation, and where there exists a complete record ready for review, the Court should hear the claims. Southern Pacific Terminal Co. v. I.C.C., supra; U.S. v. W.T. Grant Co., supra; DeFunis v. Odegaard, supra, (Brennan, J., dissenting). The right to a due process hearing when the deprivation of personal liberty is at stake, even behind prison walls, is a fundamental right that is frequently the subject of litigation. Because Wolff, grants greater procedural safeguards

* Armstrong v. Preiser, Docket No. 75 Civ. 470. Other issues in that case are the propriety of housing non-mentally ill women in a State Hospital for the criminally insane.

** The only other womens prison known to appellee's counsel is a work release facility in New York City

than did this Court in Sostre, in all likelihood many prisoners will seek relief in the District Courts of this Circuit from the outmoded procedures. It is therefore incumbent on this Court to clarify those procedures at the earliest opportunity.

CONCLUSION

The federal courts have the power and the duty to protect the constitutional rights of all individuals, including those incarcerated behind prison walls. When the State seeks to circumvent those rights, particularly the right to not be deprived of liberty without due process of law, by a system of classification, it is incumbent on this Court to look behind the label to determine the practical effects of the particular practice.

In the instant case, under the guise of counselling and evaluation, appellants kept appellee confined in segregation for thirty-seven days beyond the expiration of a sentence awarded at another disciplinary proceeding. She was so confined without any of the procedural safeguards mandated by this Court, even before the Supreme Court decided Wolff. The judgement of the District Court is the minimum necessary to ensure that she is accorded those rights. It should

(con't.)

therefore be affirmed.

Respectfully Submitted,

DONALD GRAJALES, ESQ.
Project Director
BRONX LEGAL SERVICES, CORP. C
Attorneys for Plaintiff-Appellee
579 Courtlandt Avenue
Bronx, New York 10451
Tel: (212) 993-6250

STEPHEN M. LATIMER
Of Counsel

* * * *

APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

CAROL CROOKS

Plaintiff

-against-

JANICE WARNE, individually and as Warden of the Bedford Hills Correctional Facility, CAPTAIN WOOLEY, individually and in her capacity as Captain at the Bedford Hills Correctional Facility, Lieutenant Cradle, individually and in her capacity es Lieutenant at the Bedford Hills Correctional Facility.

Defendants

---x

Order to Show Cause for Preliminary Injunction and Temporary Restraining Order

74 Civ 2351
(CLB Jr)

Upon the verified complaint and the affidavit of Stephen M. Latimer attached hereto, and

~~It appearing to the court that defendants have committed and will continue~~ to commit the acts hereinafter specified and that they will do so unless restrained by order of this court, pursuant to rule 65 (b) and that immediate and irreparable injury, loss, and damage will result to plaintiff before notice can be given and the defendants or their attorney can be heard in opposition to the granting of a temporary restraining order, in that the plaintiff has continued and continues to be subject to cruel and unusual punishment by the defendants by virtue of continued confinements in punitive segregation, without a hearing and in deprivation of her rights under the Fourteenth amendment, and the court having determined that no bond is necessary or desireable; it is ORDERED

1. That defendants shall immediately release plaintiff from segregation and shall immediately place her in the general population, and it is further

2. that defendants, their agents, servants, employees, and attorneys and all persons in active concert and participation with them be and they hereby are restrained from placing plaintiff in punitive segregation without

a hearing without notice of charges and without an opportunity to confront her accusers;

3. that the defendants show cause before this court on JUNE 3, 1974 at ~~9:30 o'clock~~ A.M. or as soon thereafter as counsel can be heard, why a preliminary injunction should not issue herein pursuant to rule 65 (a) enjoining the defendants their agents, servants, employees, and all persons in active concert and participation with them, pending the final hearing and determination of this action, from placing the plaintiff in punitive segregation without a hearing and determination of charges against her

IN ROOM 35 BEFORE JUDGE BRIEANT USDC SDNY 2:00 PM

~~4. No security be required as a condition of the temporary restraining order.~~

5. That this order expire within days after entry unless within such time the order for good cause shown is extended for a like period, or unless the defendant consents that it may be extended for a longer period; and It is further

6. That personal service of this order to show cause together with a copy of the papers hereto attached on defendants and or their attorneys on or before MAY 31, 1974, at 5:30 o'clock P M., be deemed sufficient service.

Issued at 4:40 P.M., MAY 31, 1974

/s/

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

CAROL CROOKS

Plaintiff

- against -

JANICE WARNE, individually and as Warden of the Bedford Hills Correctional Facility, CAPTAIN WOOLEY, individually and in her capacity as Captain at the Bedford Hills Correctional Facility, LIEUTENANT CRATTLE, individually and in her capacity as Lieutenant at the Bedford Hills Correctional Facility.

Defendants

----------x

AFFIDAVIT

STEPHEN M. LATIMER being duly sworn says:

I am the attorney for the plaintiff. I make this affidavit in support of plaintiff's application for a temporary restraining order, and preliminary injunction.

This motion is being brought by order to show cause instead of notice of motion because plaintiff, an inmate of Bedford Hills Correctional Facility is being kept in punitive segregation without notification of the charges against her, and without benefit of a hearing. As set forth in the verified complaint (copy annexed as Exhibit A) plaintiff was charged with disciplinary infractions and awarded a term in punitive segregation which expired on May 23, 1974. She was not released and was told that she would be confined in segregation at Bedford Hills Correctional Facility for the duration of her sentence.

Plaintiff remains confined in punitive segregation today. No hearing has been held and to my knowledge no disciplinary charges are pending against her. Thus each days confinement violates her basic rights.

I request that the order be entered without the posting of security by plaintiff. The action is for declaratory and injunctive relief. No money damages are sought, and release from punitive segregation into the general population will not cost defendants any money. Thus there are no costs or damages to be incurred by defendants if it is ultimately determined that the injunction was improvidently issued.

No prior application for the same or similar relief has been made to the court or any judge thereof.

Sworn to before me this

31 day of May ,1974

JEANNINE SMITH
Notary Public, State of New York
No. 31-4512010
Qualified in New York County
Commission Expires March 30, 1976

NOTARY PUBLIC

[SOUTHERN DISTRICT OF NEW ...]

---x

CAROL CROOKS

Plaintiff

-against-

VERIFIED COMPLAINT

JANICE WARNE, individually and as Warden of the Bedford Hills Correctional Facility, CAPTAIN WOOLEY, individually and in her capacity as Captain at the Bedford Hills Correctional Facility, LIEUTENANT CRATTLE, individually and in her capacity as Lieutenant at the Bedford Hills Correctional Facility.

Defendants

---x

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 42 USC 1983, 28 USC 1343 and the U.S. Constitution including but not limited to the Eighth and Fourteenth Amendments.

PARTIES

2. Plaintiff is a prisoner in Bedford Hills Facility and is serving a C-15 years after conviction.

3. Defendant Janice Warne is the Warden at the Bedford Hills Correctional Facility. She is responsible for the administration and operation of her respective facility and for supervising the conduct of Correction Department employees within their respective institutions. On information and belief, Captain Wooley is Captain at the Bedford Hills Correctional Facility for Women and Lieutena[illegible]rattle is Lieutenant at same Correctional Facility in Bedford Hills, New York. They are responsible for supervising the administrative and operational aspects of this facility, and included herein as defendants.

FACTS

4. Inmate Carol Crooks was brought on disciplinary infractions on March 8, 1974 and sentenced after the Superintendent's Proceeding to sixty (60) days confinement in segregation.

5. On or about March 20, 1974 Carol Crooks was transferred to the Westchester County Jail, Grasslands, Valhalla, where she was confined in segregation with this segregated confinement being excluded from the sixty (60) day sentence ordered at Bedford Hills.

6. On May 9, 1974 inmate Carol Crooks was returned to punitive segregation at Bedford Hills whereupon she was told that she must complete the sixty (60) days disciplinary confinement, as the confinement at the Westchester County Jail was excluded from time spent in confinement.

7. On May 23, 1974 inmate Carol Crooks had completed her sixty(60) day confinement sentence and was due to be released on that day at 11:00 A.M.

8. On May 23, 1974 inmate Carol Crooks was advised by Captain Wooley and Lieutenant Crattle that she would be confined in segregation for the duration of her time at Bedford Hills.

9. Captain Wooley and Lieutenant Crattle advised inmate Carol Crooks that these were directions from Warden Warne.

PLAINTIFFS CLAIM

10. Inmate Carol Crooks was confined in segregation from May 23, 1974 without notice of charges, without a hearing and without an opportunity to confront the witnesses against her.

11. Defendants actions violates plaintiffs Eighth and Fourteenth Amendment rights and Plaintiffs rights under 42 USC 1983.

WHEREFORE plaintiff prays:

1. That the Court declare that Plaintiffs rights under the Eighth and Fourteenth amendments are being violated.

2. That the court renders a judgment releasing her from punitive segregation.

3. That the defendants be enjoined from placing her in punitive segregation without a hearing, etc.

4. For such other and further relief as to the Court may deem just and proper.

Carol Crooks

CAROL CROOKS

extensions of special housing confinement. And in those instances, with the exception of Carol Crooks, there was no single person who was involved in more than three extensions.

This application then boils down to an effort to debilitate a fair, reasonable and viable system based on isolated "once in a lifetime" events.

Some plaintiffs testified to a loss of "good time" imposed in the Superintendent's hearing. Such loss is tentative only. Rule 260.4.

There was some testimony that following the August 29 incident, some plaintiffs could not obtain a shower for 6 1/2 days. The rules provide a shower at least once a week. Sec. 301.5(a). However, in Bedford inmates may shower everyday. The interruption of the shower privilege obviously related to the problems that the administration had in proceeding with a speedy investigation. It appears that this trivial complaint terminated after the first 6 1/2 days.

We submit that the rules are fair, clear and constitutional; that the plaintiffs' rights are not being violated; that Crooks v. Warne involved a single, isolated and peculiarly

unique situation (where the detention was for an unreasonable length) and the holding there applied only to the peculiar facts of the facts of the case. Thus the events of August 29, 1974 were likewise an unpredictable and unique occurrence which was handled exceedingly well with due regard for the rights of the inmates.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT
THE MOTION SHOULD BE DENIED AND
THE ACTION DISMISSED.

Dated: New York, New York
December 26, 1974

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants

MARTIMER SATTLER
Assistant Attorney General
of Counsel